No. 15-674

In The Supreme Court Of The United States

UNITED STATES OF AMERICA, ET AL.

PETITIONERS,

v.

STATE OF TEXAS, ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMICUS BRIEF OF THE STATES OF WASHINGTON, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

INTRODUCTION AND INTEREST OF AMICI CURIAE 1

ARGUMENT 2

A. The Lower Courts Erred in Enjoining the Federal Immigration Guidance Based on a Single State's Speculative Claim of Negligible Harm 3

B. Texas's Speculative Harm Pales in Comparison to the Concrete Financial, Social, and Public Safety Benefits the Guidance Will Generate for States and the Public 7

1. Allowing immigrants to work legally provides measurable economic benefits to the States 9

2. Deporting undocumented parents harms their children and States 13

3. Public safety is improved when deportation is deferred for immigrants who pose no threat to public safety 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Diginet, Inc. v. W. Union ATS, Inc.,
958 F.2d 1388 (7th Cir. 1992) 7

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178 Wash. App. 681, 317 P.3d 489 (2013) 15

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358 U.S. 224 (1959).....5

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Federal Statutes

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625 Ill. Comp. Stat. 5/6-105.1 4

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The immigration guidance at issue here is lawful and will substantially benefit the States. Plaintiffs filed this suit not because they are suffering any real harm, but rather to achieve a political goal that they could not achieve through democratic means. This Court should reverse.

Amici are the States of Washington, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and the District of Columbia (the amici States). The amici States have a strong interest in this case because the injunction entered below is preventing our States and millions of our residents from receiving the substantial economic, social welfare, and public safety benefits that will flow from the President's 2014 immigration guidance (the Guidance). We also add a helpful perspective by rebutting the distorted picture Plaintiffs have offered of the Guidance's impacts on States.

Specifically, the courts below enjoined the Guidance based on alleged violations of the Administrative Procedure Act (APA) and the Plaintiffs' claim that the Guidance will irreparably harm them by requiring them to issue more driver's licenses. These holdings are unsupportable.

The reality is that the Guidance is lawful, will substantially benefit States, and will further the public interest. In holding to the contrary, the courts below relied entirely on speculative claims of harm by one Plaintiff—Texas. But Texas's assertions failed

to justify an injunction even as to Texas, much less nationwide. The Guidance imposes no real costs on States and does not require States to provide state licenses or benefits to anyone. Moreover, several of the Plaintiff States already offer driver's licenses to undocumented immigrants. The injunction protects them from the "irreparable harm" of doing what they already do.

More broadly, as the amici States demonstrate below, the Guidance will actually benefit States and further the public interest. The Guidance will allow millions of hard-working immigrants to work legally, dramatically increasing their incomes and state tax revenues. The Guidance will also protect many law-abiding immigrants from deportation, avoiding heartbreaking situations in which undocumented parents are deported away from their U.S. citizen children, who are often then left in state child welfare systems, imposing hardships on the children and great (and unnecessary) expense on States. Finally, the Guidance will enhance public safety by reducing immigrants' fear of reporting crimes, serving as witnesses, and otherwise cooperating with state law enforcement efforts.

The bottom line is that the Guidance will benefit States, not harm us. There was no basis for the injunction, and this Court should reverse.

ARGUMENT

The courts below enjoined the Guidance based on a single State's speculative claim of harm and without meaningful regard for the public interest. This was error. *See, e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008) (describing the

standard for preliminary injunctive relief, including a likelihood of irreparable harm and that the injunction is in the public interest); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (describing the standard for permanent injunctive relief, including a showing of irreparable harm and that the injunction is in the public interest). The reality is that Plaintiffs have shown no meaningful harm, and States and the public will actually benefit from the Guidance.

A. The Lower Courts Erred in Enjoining the Federal Immigration Guidance Based on a Single State's Speculative Claim of Negligible Harm

Plaintiffs failed to show any meaningful harm justifying injunctive relief. The only evidence they offered to prove harm was Texas's allegation that the Guidance would increase state expenses by requiring the issuance of licenses to undocumented immigrants. This claim relies on a false premise—that the Guidance requires States to do anything at all—and is unsupported in any event.

1. The immigration guidance has no impact on States' authority to regulate state licenses or benefits

States, including the Plaintiff States, have adopted a wide range of approaches in deciding whether to grant driver's licenses or other state benefits to undocumented immigrants.[1] The

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[1] For example, twelve States (including two Plaintiff States) and the District of Columbia currently provide at least some form of driver's licenses regardless of immigration status.

immigration Guidance does nothing to diminish state authority to continue taking a wide range of approaches. Indeed, nothing in the Guidance requires States to do anything at all, including providing licenses or benefits to anyone. States retain authority to shape their laws to limit the availability of state benefits and licenses and to set fees for licenses. 8 U.S.C. § 1621.

Given that States retain the precise authority they had previously to regulate the licenses and benefits available to immigrants, it makes no sense to say that the Guidance injures States by forcing States to issue more licenses or provide more benefits. True, many States may choose to provide licenses to beneficiaries of the Guidance for the same reasons that they provide them to other immigrants who have received deferred action: the substantial benefits that come from reducing the number of unlicensed drivers. But doing so will be a state choice, "not the result of federal coercion." *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997). And States are free to make the opposite choice, so long as any distinctions they draw in issuing benefits or licenses are not irrationally discriminatory and thus unconstitutional.

Cal. Veh. Code § 12801.9; Colo. Rev. Stat. § 42-2-502; Conn. Gen. Stat. § 14-36m; Del. Code Ann. tit. 21, § 2711; D.C. Code § 50-1401.05; Haw. Rev. Stat. § 286-104.5; 625 Ill. Comp. Stat. 5/6-105.1; Md. Code Ann., Transp., § 16-122; Nev. Rev. Stat. § 483.291(2)(b); N.M. Stat. Ann. § 66-5-9; Utah Code Ann. § 53-3-207; Vt. Stat. Ann. tit. 23, § 603(e); Wash. Rev. Code § 46.20.035(3).

2. Even if Plaintiffs' self-inflicted "harms" could prove injury, they are illusory

Plaintiffs' claim of harm rests on the idea that they will incur costs in issuing driver's licenses to beneficiaries of the Guidance. That argument is not only legally irrelevant, as described above, but is also lacking the sort of factual basis that could justify the extraordinary, nationwide injunction entered here.

To begin with, several of the Plaintiff States already offer driver's licenses to undocumented immigrants.[2] And at least one Plaintiff State, Nevada, has explicitly concluded that offering such licenses increases state revenue because the increased fees outweigh new administrative costs.[3]

Even if there are Plaintiff States where licensing fees do not cover administrative costs, those States presumably subsidize driver's licenses in general because they see some offsetting benefit in doing so. Licensing allows States to ensure that drivers are educated about the rules of the road, pass

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[2] *See, e.g.*, Nev. Rev. Stat. 483.291; Nevada Dep't of Motor Vehicles, *Residency and Proof of Identity*, http://www.dmvnv.com/dlresidency.htm#non (last visited Mar. 4, 2016); Utah Code Ann. § 53-3-207(7) (allowing issuance of a driving privilege card to persons unable to show proof of lawful presence in the United States).

[3] *See* Agency Fiscal Note to S.B. 303 (Mar. 29. 2013), http://www.leg.state.nv.us/session/77th2013/fiscalnotes/5654.pdf; *see also, e.g.*, *Territory of Alaska v. American Can Co.*, 358 U.S. 224, 227 (1959) (permitting federal courts to take judicial notice of the legislative history of a bill).

a road skills test, and pass vision screening,[4] and it leads to fewer traffic accidents and increased rates of insurance coverage.[5] Not surprisingly, the States that have offered licenses to undocumented immigrants for the longest period have seen the biggest decrease in traffic fatalities in recent decades.[6] Although the Fifth Circuit found that the benefits of licensing undocumented immigrants are "too far removed to be applied as offsets," these traffic safety improvements are directly linked to issuing the licenses and so are inextricably tied to Plaintiffs' allegation that such licensing will harm them. *See Texas v. United States*, 787 F.3d 733, 750-51 (5th Cir. 2015).

More broadly, even if some Plaintiff States would incur costs to issue more driver's licenses, those costs are dramatically outweighed by the substantial tax and other benefits States will reap from the Guidance, described below. It was egregious error for the courts below to grant an injunction against the Guidance when in reality the Guidance will actually benefit Plaintiffs. *Cf. Diginet, Inc. v.*

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[4] Laura Goren & Michael Cassidy, The Commonwealth Inst., *Hands on the Wheel: Improving Safety and Boosting Communities Through Removing Barriers to Driver's Licenses*, 1-2, (Jan. 2016) http://www.thecommonwealthinstitute.org/wp-content/uploads/2016/01/Drivers-Licenses-for-Immigrants_Final.pdf.

[5] *See, e.g.*, Nat'l Hwy. Traffic Safety Admin., showing reduction in fatality accidents since licensing undocumented aliens in 2005, http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/stsi/49_ut/2013/49_ut_2013.htm (last visited Mar. 4, 2016).

[6] Laura Goren & Michael Cassidy, *supra* note 4, at 1-2.

W. Union ATS, Inc., 958 F.2d 1388, 1394 (7th Cir. 1992) (noting that preliminary relief makes little sense where "the harm to the plaintiff from refusing a preliminary injunction would actually be negative"). This is particularly true because many of the Plaintiff States have vanishingly small undocumented immigrant populations, so their claim of across-the-board injury from a massive influx of license applicants was and is untenable.[7] *See, e.g.*, *Nebraska Dep't of Health & Human Servs. v. U.S. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) (injunctions must be narrowly tailored to remedy specific harm shown).

B. Texas's Speculative Harm Pales in Comparison to the Concrete Financial, Social, and Public Safety Benefits the Guidance Will Generate for States and the Public

In assessing a plaintiff's claim of harm and evaluating the public interest, this Court has always demanded actual evidence, not mere speculation. The Court has been especially demanding when the subject matter at issue is not "a new type of activity with completely unknown effects[.]" *Winter*, 555 US. at 23.

Like the military training exercises in *Winter*, immigration deferral is not a new policy with

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[7] For example, Plaintiffs Montana, North Dakota. South Dakota, and West Virginia are each home to less than 5,000 undocumented immigrants. Pew Research Ctr., *Unauthorized Immigrants in the U.S., 2012* (Nov. 18, 2014), http://www.pewhispanic.org/interactives/unauthorized-immigrants-2012/ (last visited Mar. 4, 2016).

unknown effects. The 2014 Guidance is consistent with a long pattern of presidential exercises of enforcement discretion within the bounds of immigration law to protect families and target resources by deferring deportation for those who are contributing to our society and pose no threat. For example, following passage of the Immigration Reform and Control Act of 1986, President Reagan and then President George H.W. Bush deferred deportations for family members of immigrants who were in the process of obtaining legal status.[8] These deferrals impacted over 40% of undocumented immigrants.[9] President Clinton similarly deferred action for immigrant women and children abused by a United States citizen or legal permanent resident.[10]

The history of immigration deferral provides ample concrete evidence that suspending deportation and providing work authorization provides real

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[8] Pub. L. No. 99-603, 100 Stat. 3359; Memorandum from Gene McNary, INS Comm'r, to Regional Comm'rs (Feb. 2, 1990), http://www.factcheck.org/UploadedFiles/2014/11/McNary-memo.pdf (*Re: Family Fairness: Guidelines For Voluntary Departure under 8 CFR 242.5 For the Ineligible Spouses and Children of Legalized Aliens*).

[9] American Immigration Council (Oct. 2014), http://www.immigrationpolicy.org/just-facts/executive-grants-temporary-immigration-relief-1956-present (*Executive Grants of Temporary Immigration Relief, 1956-Present*).

[10] Memorandum from Paul W. Virtue, Acting Exec. Assoc. INS Comm'r, to Regional Directors et al. (May 6, 1997), http://www.asistahelp.org/documents/resources/virtue_memo_97pdf_53dc84d782445.pdf (*Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues*).

financial, social, and public safety benefits to States and the public. These tangible benefits vastly exceed Texas's speculative claims of harm.

1. Allowing immigrants to work legally provides measurable economic benefits to the States

Past experience demonstrates that suspending deportation and providing work authorization aids families and state economies by increasing earnings and growing the tax base. The reason is simple: When workers are able to come out of the shadows and move between jobs, they are able to maximize their income.

The most recent example of the benefits provided by allowing immigrants to work legally is the 2012 Deferred Action for Childhood Arrivals Program (DACA). DACA offered temporary relief to more than 2.1 million undocumented immigrants who came to the United States as children.[11] DACA participation resulted in almost 60% of respondents obtaining new jobs,[12] and surveys of DACA

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[11] Jeanne Batalova et al., Migration Policy Inst., *DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action* (Aug. 2014), http://www.migrationpolicy.org/research/daca-two-year-mark-national-and-state-profile-youth-eligible-and-applying-deferred-action.

[12] Roberto G. Gonzales & Angie M. Bautista-Chavez, American Immigration Council, *Two Years and Counting: Assessing the Growing Power of DACA* (Special Report / June 2014), http://www.immigrationpolicy.org/special-reports/two-years-and-counting-assessing-growing-power-daca.

beneficiaries found that their wages increased by over 240 percent.[13]

The economic impacts of DACA are consistent with findings on the economic impact of the Immigration Reform and Control Act of 1986 (IRCA), which provided legal status to three million undocumented immigrants.[14] Under IRCA, too, workers' wages noticeably increased: male IRCA beneficiaries were able to increase their wages 8.4% and female beneficiaries' wages increased 13%.[15]

In addition to allowing immigrants to better support their families, permitting immigrants to work legally has the tangible public benefit of generating additional tax revenue for States. In Washington, for example, approximately 105,000 people are anticipated to be eligible for deferred immigration action under the Guidance.[16] Assuming that even a portion of those eligible for deferral obtain a temporary work permit, Washington's tax

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[13] Dr. Raul Hinojosa-Ojeda, N. Am. Integration & Dev. Ctr., UCLA, *From the Shadows to the Mainstream: Estimating the Economic Impact of Presidential Administrative Action and Comprehensive Immigration Reform* 17 (Nov. 21, 2014), http://www.naid.ucla.edu/uploads/4/2/1/9/4219226/national_administrative_action_final_v2.pdf.

[14] *Id.* at 9.

[15] *Id.* at 9-10.

[16] Migration Policy Inst., *National and State Estimates of Populations Eligible for Anticipated Deferred Action and DACA Programs* (Nov. 2014) (Excel spreadsheet), http://www.migrationpolicy.org/sites/default/files/datahub/US-State-Estimates-unauthorized-populations-executive-action.xlsx.

revenues are estimated to grow by $57 million over the next five years.[17] And the larger a State's undocumented immigrant population, the larger the tax benefits will be for that State. For example, if the Guidance takes effect, California's tax revenues are estimated to grow by $904 million over the next five years as a result of taxes paid by the 1,214,000 people eligible for deferred immigration action there.[18]

The Plaintiff States would also experience significant financial benefits from the Guidance. For example, if the estimated 594,000 undocumented immigrants eligible for deferred action in Texas receive temporary work permits, it will lead to roughly $338 million in increased state tax revenues over five years.[19]

This injection of tax money is not limited to the States. Granting deferred action to undocumented immigrants also has a striking impact on the national economy. As the non-partisan Congressional Budget Office reported, stopping the Guidance from taking effect will cost the federal

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[17] Ctr. for American Progress, *Executive Action on Immigration Will Benefit Washington's Economy*. http://www.scribd.com/doc/247296801/economic-benefits-of-executive-action-in-washington (last visited Mar. 4, 2016).

[18] Ctr. for American Progress, *Executive Action on Immigration Will Benefit State Economies*, http://www.scribd.com/doc/248189539/topline-fiscal-impact-of-executive-action-numbers-for-31-states (last visited Mar. 4, 2016).

[19] *Id.*

government roughly $22 billion in lost tax revenue over the next ten years.[20]

Deferring immigration action also aids American employers by expanding the pool of workers available to meet national labor demands. Immigrants are concentrated at the upper and lower ends of the scale of worker skill level. At the upper end of the scale, immigrants play a critical role in filling the rising demand for science and engineering workers, as the United States' share of PhDs awarded globally has decreased.[21] At the other end of the scale, immigrants play a crucial role in filling the demand for low-skilled work in a range of fields, especially in agricultural positions that would likely otherwise go unfilled.[22] Immigrant workers in low-skilled jobs benefit the economy by lowering the cost

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[20] Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Thad Cochran, Chairman, Comm. on Appropriations (Jan. 29, 2015), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr240.pdf (*Re: Budgetary Effects of Immigration-Related Provisions of the House-Passed Version of H.R. 240, An Act Making Appropriations for the Department of Homeland Security*).

[21] Richard B. Freeman, Nat'l Bureau of Econ. Research, *Is A Great Labor Shortage Coming? Replacement Demand in the Global Economy* (Sept. 2006), http://www.nber.org/papers/w12541.pdf (Working Paper Series No. 12541).

[22] Audrey Singer, Brookings Inst., *Immigrant Workers in the U.S. Labor Force* (Mar. 15, 2012), http://www.brookings.edu/research/papers/2012/03/15-immigrant-workers-singer (last visited Mar. 4, 2016).

of living, with negligible impacts on low-skill native workers.[23]

2. Deporting undocumented parents harms their children and States

Deportation has devastating impacts on families, and especially on innocent children. One in five undocumented immigrant adults living in the United States has a spouse that is a U.S. citizen or lawful permanent resident, and 3.8 million undocumented immigrants have children who are U.S. citizens.[24] When immigration raids tear a parent from the home, the result is often housing instability, struggles to feed children, and increased reliance on public benefits.[25] Even when one parent remains, children in single-parent households are four times more likely to live in poverty than children living with both parents.[26] Conversely, allowing parents of U.S. citizens and lawful

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[23] Patricia Cortes, *The Effect of Low-Skilled Immigration on U.S. Prices: Evidence from CPI Data*, 116 J. Pol. Econ. 381 (June 2008).

[24] Ctr. For American Progress, *The Facts on Immigration Today* 5 (Oct. 2014), http://cdn.americanprogress.org/wp-content/uploads/2013/04/ImmigrationFacts-brief-10.23.pdf.

[25] Ajay Chaudry et al., Urban Inst., *Facing Our Future: Children in the Aftermath of Immigration Enforcement* viii-ix (Feb. 2, 2010), http://www.urban.org/research/publication/facing-our-future/view/full_report.

[26] Joanna Dreby, Ctr. for American Progress, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities* 9 (Aug. 2012), https://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf.

permanent residents to increase their earnings by working legally improves their ability to support their U.S. citizen children, reducing the cost of state social service benefits.

In addition to harming families and children, deporting undocumented parents of U.S. citizen children also imposes significant costs on State child welfare systems. For example, in the first six months of 2011, more than 46,000 parents of U.S.-citizen children were deported.[27] When parents are deported, it can be difficult for States to find the parents and reunite them with their children. As a result, in 2011 alone, detaining or deporting parents resulted in an estimated 5,100 children being placed in foster care.[28] In addition to the traumatic impact this can have on a child, it is also a needless and substantial expense for States: it costs a state approximately $26,000 a year to provide care for a foster child.[29] And the existence of fit parents—even if they have been deported—can also prevent States from seeking alternative placement options for a child, such as a guardianship or adoption by another

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[27] *Id.* at 1.

[28] Seth Freed Wessler, Applied Research Ctr., *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* 6 (Nov. 2011), http://www.atlanticphilanthropies.org/sites/default/files/uploads/ARC_Report_Shattered_Families_FULL_REPORT_Nov2011Release.pdf.

[29] Nicholas Zill, Nat'l Council For Adoption, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption* 3 (May 2011), https://www.adoptioncouncil.org/publications/2011/05/adoption-advocate-no-35 (Adoption Advocate No. 35).

family member or third party.[30] Deferred deportation allows families to remain together, even if only temporarily.

It is difficult to imagine a more compelling public interest than allowing loving parents to care for their children and children to remain with their parents. The lower courts simply ignored these important interests hanging in the balance of this case.

3. Public safety is improved when deportation is deferred for immigrants who pose no threat to public safety

Effective local law enforcement depends on a trusting relationship between police and the communities they serve. That relationship is critically threatened when undocumented immigrants fear that interaction with the police may lead to their deportation.[31] When surveyed, 70 percent of undocumented Latinos indicated that they are less likely to call the police if they are victimized, because they fear police will inquire into their immigration status or the status of people they

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[30] *See, e.g., In re Guardianship of D.S.*, 178 Wash. App. 681, 317 P.3d 489 (2013) (inability to return a child to a deported parent in the near future does not justify a guardianship if there are no other parental deficiencies).

[31] Anita Khashu, Police Found., *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties* 24 (Apr. 2009). http://www.policefoundation.org/publication/the-role-of-local-police-striking-a-balance-between-immigration-enforcement-and-civil-liberties/.

know.[32] When victims of abuse are reluctant to seek help, and witnesses to crime are wary of deportation, crimes go unreported and unsolved. Conversely, law enforcement research demonstrates that when immigrant victims hold U-Visas, a form of temporary legal immigration status, the rate of calls to police and assistance in investigation and prosecution is extremely high.[33]

Just as the lower courts ignored the economic and social benefits of immigration deferral, they similarly ignored the public safety benefits. But as this Court has stressed, "'[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). Here, those public consequences weigh strongly in favor of allowing the Guidance to take effect.

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[32] Nik Theodore, Univ. of Ill. Chicago, Dep't of Urban Planning & Policy, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 5 (May 2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

[33] *See* Natalia Lee et al., American Univ., Washington College of Law, *National Survey of Service Providers on Police Response to Immigrant Crime Victims, U Visa Certification and Language Access*, 6-7, 13 (Apr. 16, 2013), http://www.masslegalservices.org/system/files/library/Police%20Response%20U%20Visas%20Language%20Access%20Report%20NIWAP%20%204%2016%2013%20FINAL.pdf.

CONCLUSION

The evidence is unequivocal: the Guidance will benefit States, not cause us harm. This Court should reverse the decision below and allow the Guidance to take effect.

RESPECTFULLY SUBMITTED.

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